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Eminent Domain--Qualifying the Non-Expert Witness

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majority appears to have read this elastic element into the Act. This was done almost as if for the particular circumstance, because the *Columbia Steel* case was not overruled as consistency would dictate. Rather it was cited and quoted approvingly by the Court.

The precedential value of the *First National Bank* case is for situations involving assets acquisitions, not accompanied by merger, by corporations not subject to the jurisdiction of the FTC. These acquisitions were not brought within the realm of the Clayton Act by the *Philadelphia National Bank* case. The Government must rely on the Sherman Act. It is almost a certainty that both prosecutor and prosecuted will argue that the *First National Bank* case compels a decision in their favor, that the Justice Department will rely on the rule of per se illegality, and that the defendants will rely on the *Columbia Steel* factors test.

William H. Fortune

EMINENT DOMAIN—QUALIFYING THE NON-EXPERT WITNESS.—In a condemnation action, the property owner was permitted to testify as to the fair market value of the property in question. The Commonwealth moved to strike the testimony as incompetent. The motion was denied and the jury found for the property owner in the amount of 44,000 dollars. *Held*: Reversed and remanded. The testimony given by the property owner revealed no familiarity with property values in the neighborhood and was clearly incompetent. The court went on to say prospectively that the property owner will not be *presumed* competent simply because he is the owner of the property in question; that the owner must be qualified as competent before he gives an estimate of value. *Commonwealth v. Fister*, 373 S.W.2d 720 (Ky. 1963).

The court in the *Fister* case was careful to say that it was making only a procedural change; that under prior Kentucky law¹ the property owner was *presumed* competent to testify as to market value, but if it were shown on cross examination that he was not, the testimony was subject to motion to strike. This case has the immediate effect of certifying the law. The prior law seemingly was in conflict as to the status of the property owner as a witness on market value.² Decisions in which it was held error not to strike the owner's testimony may

¹ Hipp-Green Lumber Corp. v. Potter, 271 S.W.2d 892 (Ky. 1954).

² See generally 32 C.J.S. *Evidence* § 545(3): "Although there is some authority to the contrary it is generally held that the owner of realty is competent to testify as to its value; and his estimate is received although his knowledge on the subject is not such as would qualify him to testify if he were not the owner."

have turned on whether the property in question was of a technical nature so that evaluation was difficult,³ or whether the witness was merely an officer of the corporate owner of the property.⁴ On the other hand, it is not at all clear that the owner was ever presumed to be a competent witness on account of ownership.⁵ Whether the *Fister* case changed the law at all and whether the change, if any, was substantive or procedural are moot questions. It is now clear that the owner stands in no better position than any other witness and must be qualified *before* he gives an opinion as to market value.

The secondary effect of the *Fister* case is to raise the question of what qualification is necessary. The attorney must consider the distinct possibility that his witness may not be allowed to give an opinion as to the value of the property in question.

Generally, appellate courts have considered that the matter of qualification is within the discretion of the trial court⁶ and trial courts have traditionally been lenient in accepting testimony. Trial courts generally consider a non-expert witness competent if he has superior knowledge of the property in question and it appears that he can contribute something to the jury's evaluation.⁷

In the past, Kentucky courts likewise have been lenient in allowing non-experts to testify.⁸ As recently as 1963, the court of appeals has *Saulsberry v. Ky. & W. Va. Power Co.*, 226 Ky. 75, 10 S.W.2d 451 (1928), remarked that in very few instances is there any issue of qualification,⁹ and the attitude of the courts undoubtedly has been that the inexperience and ineptness of the witness goes to the weight of his testimony, not to his competency.¹⁰

But the court of appeals in the very recent case of *Commonwealth v. Slusher*¹¹ set out the general prospective rule that a non-expert witness must: (1) know the property to be valued, and (2) the value of the property in the vicinity, (3) must understand the standard of value, and (4) must be possessed of the ability to make a reasonable inference.¹² It is apparent that a trial court may on the basis of that

³ *Hipp-Green Lumber Corp. v. Potter*, *supra* note 1.

⁴ *Allen Co. v. Thoroughbred Motor Court, Inc.*, 272 S.W.2d 343 (Ky. 1954).

⁵ "There must be some basis for a knowledge of market value *before* a witness may express an opinion as to value." (Emphasis added.) *Allen Co. v. Thoroughbred Motor Court, Inc.*, *supra* note 3, at 344. *But cf. Barron v. Phelps*, 238 S.W.2d 1016 (Ky. 1951).

⁶ 1 Orgel, *Valuation Under Eminent Domain* § 132 (2d ed. 1953).

⁷ 5 Nichols, *Eminent Domain* 206 (3d ed. 1962).

⁸ *Paintsville Nat. Bank v. Conley*, 257 Ky. 425, 78 S.W.2d 313 (1935);

⁹ *Commonwealth v. Tyree*, 365 S.W.2d 472, 475 (Ky. 1963).

¹⁰ *Commonwealth v. Tyree*, *supra* note 9, at 478; *Cf. Commonwealth v. Begley*, 272 Ky. 289, 292, 114 S.W.2d 127, 129 (1938).

¹¹ 371 S.W.2d 851 (Ky. 1963).

¹² *Commonwealth v. Slusher*, *supra* note 11, at 853, quoting 32 C.J.S. *Evidence* § 545.

decision be quite exacting in determining the qualifications of the non-expert. First, the witness is supposed to have some knowledge of property values in the vicinity and, while a knowledge of comparable sales is not necessary,¹³ it is incumbent on the witness to convince the court that he "knows" property. How this is to be done without the use of comparable sales is not clear. Secondly, the witness must *understand* the standard of value. While no court would require a witness to recite the traditional definition of market value,¹⁴ a court might well require that the witness evince some conceptual understanding of the real estate market and that values are not what people are asking¹⁵ or what the witness would pay for it.¹⁶ Thirdly, the witness is required to be able to make a reasonable inference. Whatever that term may encompass, a trial judge could surely disqualify a witness if it appeared that the witness lacked the basic intelligence to relate his abstract knowledge of market value and the market to the property in question.

In the *Fister* case, the court of appeals held that the property owner's testimony should have been stricken because the owner did not disclose any familiarity with property values in the neighborhood, because his estimates were based on irrelevant factors which did not legally affect market value, and because his valuations showed an unexplained discrepancy.¹⁷ The court looked back at the witness' testimony and decided that the record showed that the witness was incompetent. Admittedly, the court declared that other non-expert opinions, while not of a high caliber, were competent.¹⁸ Nevertheless, the portent of this case is that thorough cross examination, using the requisite qualifications as set out in the *Slusher* case, may prevent much opinion evidence from ever being heard by the jury. If the trial court refuses to allow adequate preliminary examination or refuses to disqualify for shown cause, there is a basis for reversing in the court of appeals. The attorney who would use the non-expert to establish his damages must prepare the witness for an examination as to his knowledge of the property in question, his knowledge of neighboring property values, his concept of fair market value, and his ability to make a reasonable inference.

William H. Fortune

¹³ Commonwealth v. Smith, 229 Ky. 345, 17 S.W.2d 203 (1929).

¹⁴ "The market value is the price which it will bring when it is offered for sale by one who desires to sell but is not compelled to do so, and is bought by one who desires to purchase but is not compelled to have it." Commonwealth v. Combs, 244 Ky. 204, 211, 50 S.W.2d 497, 500 (1932).

¹⁵ Commonwealth v. Begley, *supra* note 10, at 292, 114 S.W.2d at 129.

¹⁶ Brown v. Town of Eustis, 293 Fed. 197, 198 (S.D. Fla. 1923).

¹⁷ Commonwealth v. Fister, 373 S.W.2d 720, 721 (Ky. 1963).

¹⁸ *Ibid.*